Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-312

CORENSWET, INC.,
Petitioner,

versus

AMANA REFRIGERATION, INC.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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CORENSWET, INC.,
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AMANA REFRIGERATION, INC.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

The Respondent, Amana Refrigeration, Inc., respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Fifth Circuit's unanimous opinion in this case. That opinion is reported at 594 F. 2d 129 (5th Cir. 1979).

OPINIONS BELOW

In addition to the opinions cited in the Petition, the Petitioner's Motion for Stay of the Issuance of Mandate pending petition for writ of certiorari was denied by the Fifth Circuit on June 19, 1979 and mandate issued. See Appendix A hereto, pp. A-1. and A-3., *infra.*

JURISDICTION

Respondent does not question the jurisdiction as set forth in the petition.

QUESTIONS PRESENTED

Respondent denies that the *"Questions Presented"* in this matter are as stated by Petitioner. Rather, Respondent asserts that the following is the single, proper question presented:

> Whether under Iowa law, a distributorship contract of indefinite duration which, according to its express terms, can be terminated by either party *"at any time for any reason"* cannot, nevertheless, include a termination for any arbitrary, capricious or wanton reason.

STATUTES INVOLVED

With respect to the statutes cited in the Petition, Respondent denies that Section 2-302 of the Uniform Commercial Code, as enacted in Iowa, Iowa Code Annotated (I.C.A.) Section 554.2302 is involved in this matter. [1]

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1. Section 2-302 pertains to an *"unconscionable"* contract or provision. However, as the Fifth Circuit correctly observed, the unconscionability issue was not involved in the preliminary injunction hearing. See Appendix A, Brief for Petitioner, n.12 at A-24.

STATEMENT OF FACTS

Respondent objects to the manner in which much of the Statement of Facts has been set out in the Petition. What is most disconcerting are Petitioner's repeated attempts to utilize the Statement of Facts as a vehicle for argument. In addition, in several instances what Petitioner states to be *"a fact"* in its Statement of Facts is in reality nothing more than evidence which was in conflict at the preliminary injunction hearing.

Rather than belabor the Court with a lengthy list of the unwarranted argument and factual inaccuracies contained in Petitioner's Statement of Facts, Respondent, in the interests of brevity and accuracy and for the purposes of this Petition for Writ of Certiorari, adopts as its Statement of Facts the Fifth Circuit Court of Appeals' discussion of the facts, which discussion will be found in the Appendix to the Petition, pages A-7 to A-11.

However, there is one factual event which occurred subsequent to the Fifth Circuit's decision in this case and which should be brought to the Court's immediate attention since it deprives this matter of standing as a justiciable case or controversy. On June 19, 1979, the Fifth Circuit denied Petitioner's request for stay of mandate pending Petitioner's application for writs and mandate was issued. See Appendix A hereto, pp. A-1 and A-3, *infra*. The parties were thereby set free from the effects of the preliminary injunction that had been in existence, the distributorship arrangement was thereafter terminated, all appliances and parts that had been in

Petitioner's possession were returned by Petitioner to Respondent, and the distributorship for the territory was awarded by Respondent to another who has since acted as Respondent's sole distributor for the area. See the Affidavit of Dan R. McConnell, Appendix A hereto, pp. A-5 through A-6, *infra*. This additional information is supplied to the Court in keeping with the following mandate found in a learned treatise on the subject by Messrs. Stern and Gressman, *vis:*

> "The facts that give rise to problems of mootness or abatement almost always occur after the record below has been closed. The rule against referring to facts outside the record however does not apply to such matters. On the contrary, the Supreme Court regards it as the duty of counsel to call such facts to its attention in order that it may not unknowingly exercise its authority in cases in which it no longer has jurisdiction. Indeed, counsel should disclose to the Court any and all facts that may raise a question as to mootness even though counsel is of the view that the case is not thereby rendered moot or does not wish the case to be treated as moot." R. Stern and E. Gressman, *Supreme Court Practice*, p.896 (5th Ed. 1978).

REASONS FOR NOT GRANTING THE WRIT

Respondent submits the following reasons for denial of the writ:

1. *The Issue is Moot.* The facts set forth in the Affidavit of Dan R. McConnell, Appendix, pp. A-5 through A-6, *infra.*, demonstrate that this case has lost its viability as a live case or controversy. The distributorship has been terminated and has been awarded to another and there is nothing left to be preserved by issuance of an injunction. The issues raised in the petition for a writ of certiorari are therefore moot. As Messrs. Stern and Gressman have stated:

> "An injunction proceeding may become meaningless if an act sought to be enjoined . . . has irretreivably occured." *Id.* at p. 887.

The thing sought to be prevented (the termination of the distributorship agreement) has been done, and cannot be undone by any judicial action. *Richardson v. McChesney,* 218 U.S. 487, 491-93 (1910) citing *Mills v. Green,* 159 U.S. 651 (1895); *Jones v. Montague,* 194 U.S. 147 (1904). The duty of the Court is limited to the decision of actual pending controversies and it should not pronounce judgment upon abstract questions, however such opinion might influence future action in like circumstances. *Richard v. McChesney, supra,* at pp. 491-93. The factual posture of this case presents no such actual pending controversy nor does it come within the ambit of the exceptions to the doctrine of mootness. *United States v. W. T. Grant Company,* 345 U.S. 629, 632 (1952); *Southern Pacific Terminal Company v. Interstate Commerce Commission,* 219

U.S. 498, 515 (1911). The issue of mootness can be examined not only at the time suit was initiated, but even at the stage of certiorari review. *DeFunis v. Odegaard,* 416 U.S. 312, 319 (1974); *Roe v. Wade,* 410 U.S. 113, 125 (1973). The issues posed by the petition are moot and the petition should be denied.

2. *No Constitutional Issues Involved.* The petition does not set forth any issues requesting this Court to interpret and/or apply the provisions of the United States Constitution. In short, the Petition on its face is devoid of any federal constitutional issues.

3. *No Conflict With Another Court Of Appeals Decision.* The decision of the Fifth Circuit Court of Appeals is not in conflict with the decision of another Court of Appeals on the same subject matter. The Petitioner's Brief is misleading in its attempt to argue that the Fifth Circuit's decision approving arbitrary terminations under the Uniform Commercial Code is contrary to other federal Court of Appeal decisions. (See Brief for Petitioner at pp. 24, 25). First, there is no other federal Court of Appeals decision interpreting Iowa law on the point at issue. Second, neither *Randolph v. New England Mutual Life Ins. Co.,* 526 F.2d 1383 (6th Cir. 1975); nor *deTreville v. Outboard Marine Corp.,* 439 F.2d 1099 (4th Cir. 1971); nor *Tele-Controls, Inc. v. Ford Industries, Inc.,* 388 F.2d 48 (7th Cir. 1967) involve any interpretation of the Uniform Commercial Code, much less an interpretation of the specific U.C.C. sections addressed by the Fifth Circuit. Indeed, the Fifth Circuit in its decision made reference to the three above-cited Court of Appeals' decisions and clearly and correctly *distinguished* those decisions on the ground that those cases involved interpretation of state law doctrines that antedated the adoption of the Uniform Commercial

Code in each of the three states involved. [2]

Accordingly, there is no decision of another federal Court of Appeals which is in conflict with the decision of the Fifth Circuit Court of Appeals involved in the instant case. To the extent the Petitioner's Brief states otherwise, it is clearly misleading and inaccurate.

4. *No Conflicts With Prior Decisions Of This Court.* The Petitioner has not cited any decision of this Court which is in conflict with or in any manner inconsistent with the decision of the Fifth Circuit Court of Appeals involved herein. Indeed, no conflict could exist since this Court has never addressed Iowa law on the subject at issue and, for that matter, has never interpreted or applied Sections 1-102, 1-203, 1-205, 2-208 or 2-309 of the Uniform Commercial Code as Petitioner requests the Court to do in this case. In fact, Respondent has found no prior decisions of this Court wherein the Court has concerned itself at all with the provisions of Article 2 of the Uniform Commercial Code pertaining to Sales. Rather, this Court's prior involvement with the U.C.C. has been limited primarily to Article 9 dealing with Security Interests, and in particular resolving questions of lien priorities in either the federal bankruptcy context or in the context of interpret-

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2. The *Randolph v. New England Mutual Life* case involved Ohio law; *deTreville v. Outboard Marine* concerned South Carolina law; and *Tele-Controls v. Ford Industries* pertained to Oregon law.

ing some other federal loan program or statute. [3]

Accordingly, there exists no conflict between the decision of the Fifth Circuit Court of Appeals and any prior decisions of this Court which in any manner justifies the issuance of a writ of certiorari in this case. [4]

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3. See, *e.g., United States v. Kimbell Foods, Inc.*, ___ U.S. ___, ___ S.Ct. ___, 59 L.Ed.2d 711 (1979) - priority of contractual liens involving certain federal loan programs; *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978) - constitutional question re provision of New York U.C.C. provision; *Mahon v. Stowers*, 416 U.S. 100 (1974) - bankruptcy proceeding involving Packers and Stockyards Act.

4. Petitioner cites *Commercial National Bank v. Canal-Louisiana Bank & Trust Co.*, 239 U.S. 520 (1916) for the proposition that uniform acts should, in the absence of any statutory or judicial variation of the individual states, be construed to achieve uniformity among the states. Petitioner seemingly implies that the decision of the Fifth Circuit is at variance with this principle. Petitioner's arguments in this regard are not well taken. First of all, the *Commercial National Bank* case arose in the context of interpreting and applying the federal Bankruptcy Act. Neither the Bankruptcy Act nor any other federal statute or regulation of national import is at issue in the instant case. Secondly, Petitioner's attempt to argue that the Fifth Circuit's interpretation of the specific U.C.C. provisions is an "exception" to some uniform interpretation is without support. Section 2-309 is as much a part of the U.C.C. as Section 1-203 and the other provisions of the U.C.C. cited by Petitioner and it is Petitioner who sought and who here seeks to have an "exception" made to its application, which the Fifth Circuit declined to do. Moreover, as noted, *supra*, the three federal Court of Appeals' decisions cited by Petitioner are clearly distinguishable because none of these cases involved the Uniform Commercial Code. In addition, while there have been some state court decisions indicating that a "good faith" standard is applicable to terminations under the U.C.C., nevertheless, as the Fifth Circuit indicated in its opinion, there are other cases to the contrary. *see, e.g., Rockwell Engineering Co. v. Automatic Timing and Controls Co.*, 559 F.2d 460 (7th Cir. 1977) (Indiana law); *Aaron E. Levine & Co. v. Calkraft Paper Co.*, 429 F.Supp. 1039 (E.D. Mich. 1976) (Michigan law). Consequently, a better argument is that the decision of the Fifth Circuit Court of Appeals, handed down by a Court which Petitioner acknowledges as an influential federal appellant court was a proper interpretation of Section 2-309 of the Uniform Commercial Code and was fully in accord with the *Commercial National Bank* case's objective of seeking uniformity in application of uniform state laws.

5. *No Important Question Of Federal Law.* Because Petitioner is unable to satisfy the traditional requisites for the issuance of a writ of certiorari (significant constitutional questions; clear split among the federal court of Appeals), Petitioner attempts in the majority of its argument to make a "Federal case" out of a controversy between two private corporate parties involving the application of Iowa law. As noted by this Court in *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944), except in "exceptional cases", this Court is not prone to review"the considered determination of questions of state law by the intermediate federal appellate courts". [5] As will be discussed, Petitioner's attempt to characterize the instant case as such an "exceptional case" is totally unjustified. There are simply no critical and overriding issues of national or federal concern which compel this Court to review the well-reasoned opinion of the Fifth Circuit.

The instant case involves nothing more than a private dispute between two large corporate entities concerning a written distributorship agreement between the parties. More specifically, it simply involves the question as to the circumstances under which either party may exercise its right of termination under the written distributor agreement as construed according to the laws of the State of Iowa. Against

5. Petitioner should not be heard to complain that the Fifth Circuit's interpretation of Iowa law should not be accorded the same weight as an interpretation of Iowa law by the Eighth Circuit. Since the inception of this litigation, Petitioner has acknowledged that Iowa law controls. If Petitioner was concerned about receiving a more appropriate interpretation of Iowa law, Petitioner could easily have brought this litigation in the state or federal Courts located in Iowa rather than in Louisiana.

this basic legal framework, Petitioner makes the sweeping assertion that if the Fifth Circuit's decision is allowed to stand, it will have a "dramatic and deleterious impact on the national franchising phenomenon, as well as on its surrounding legal structure". [6] If Petitioner is so concerned about the circumstances under which a franchisor-franchisee relationship can be terminated, then Petitioner's energies should be directed toward securing appropriate legislation in the State of Iowa. That legislation is the proper vehicle for establishing legal standards governing the termination and/or non-renewal of franchises is acknowledged in Petitioner's own Brief wherein Petitioner states that, "[t]he main burden of combatting the evil of arbitary termination has fallen upon state law" (Brief for Petitioner at p. 15). Petitioner goes on to note that some fourteen states have enacted general franchising statutes pertaining to circumstances under which franchise agreements may

6. Brief for Petitioner at 12. Throughout its Petition, Petitioner attempts to characterize itself as a helpless franchisee forced to do business under a one-sided distributor agreement. Respondent objects to any such characterization as being both misleading and beyond the scope of review. As noted *supra*, p. 3, n. 1, the issue of unconscionability of the termination clause is not presented for review. Further, it is not unconscionable on its face. The specific right to terminate the distributor agreement "at anytime for any reason" was available to *both* parties. Accordingly, Petitioner possessed the right to terminate Respondent "for any reason". Petitioner conveniently overlooks these facts; however, its significance did not go unnoticed by the Fifth Circuit. See Appendix - Brief for Petitioner at A-16 and A-23 through A-24.

or may not be terminated.[7] Similarly; if Petitioner is concerned that some uniform standard relating to distributor terminations be applied nationwide, then the appropriate redress should be sought through Congress and not through this Court. Once again, Petitioner's own Brief evidences the legislative nature of Petitioner's concerns wherein it notes that some twelve bills have been introduced in the 95th Congress alone pertaining to the standards for terminating franchises. [8]

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7. Respondent takes exception to Petitioner's repeated attempts in its Petition to bring the distributorship agreement involved in the instant case within the ambit of the "national franchising phenomenon". In other words, Petitioner is attempting to equate the traditional manufacturer-distributor agreement with the more commonplace "franchise agreement" generally utilized in the fast-food industry, etc. Such a comparison is misleading and unfair. For while abuses may generally exist in the typical "franchise" situation, such abuses are not necessarily present in the more traditional manufacturer-distributor relationship involving knowledgeable corporate parties as in the instant case. For example, the proposed Federal Trade Commission trade regulation rules pertaining to disclosure requirements and prohibitions concerning franchising and business opportunity ventures would not, in Respondent's opinion, even apply to the distributorship relationship involved in the instant case according to Respondent's interpretation of the F.T.C.'s interpretive guidelines for the proposed rule. 43 Fed. Reg. 59,614, *et seq.* (1978); F.T.C., *Franchising and Business Opportunities - Rule and Guides* (1979).

8. Brief for Petitioner at p. 15, n.9. Petitioner's Brief fails to note that none of these bills have yet to be reported out of Committee. Perhaps the Petitioner's fears in the area of franchise terminations are not of such great "national concern" as Petitioner would lead this Court to believe.

Petitioner's attempt to utilize this forum is order to legislate standards concerning terminations of franchise agreements is in direct conflict with this Court's Rule 19. Indeed, for this Court to involve itself in interpretations of the Uniform Commercial Code when no constitutional issues or federal statutes or regulations *(e.g.,* Bankruptcy Act, Internal Revenue Code, etc.) are involved would encourage more and more petitions for writ of certiorari and place an increasing burden upon this Court's docket and workload. Diversity cases such as the instant case which involve disputes between private litigants with no constitutional or other substantial federal question at issue simply do not merit consideration by this Court. This is especially true when, as in the instant case, a review is sought of a federal Court of Appeal's interpretation of specific provisions of the Uniform Commercial Code pertaining to contracts of sale. For while the Code is intended to make more uniform the commercial laws of the various states, nevertheless, absent constitutional issues or other federal statutory questions, it remains a body of law to be adopted, modified and interpreted under state law. It would be an unwarranted precedent indeed for this Court to involve itself in an interpretation of the Uniform Commercial Code as adopted in one state based upon a porous argument that such action is necessary in order to "legislate" some federal Uniform Commercial Code.

CONCLUSION

It is respectfully submitted that Petitioner has wholly failed to sustain its burden of establishing under Rule 19 that there are special and important reasons why the Writ should be granted. The decision of the Fifth Circuit Court of Appeals below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor has the Court of Appeals decided a federal question in a way to conflict with applicable decisions of this Court or of another Court of Appeals on the same matter. For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NOS. 77-1538 & 77-3474

FILED: JUNE 19, 1979

CORENSWET, INC,
Plaintiff-Appellee,

versus

AMANA REFRIGERATION, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Louisiana

ORDER:

(X) The motion of APPELLEE for stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of _____ for stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the

certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion for a further stay of the issuance of the mandate is GRANTED to and including_____, under the same conditions as set forth in the preceding paragraph.

( ) It is ORDERED that the motion for a further stay of the issuance of the mandate is DENIED.

S/ Robert A. Ainsworth, Jr.
UNITED STATES CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 77-1538

D.C. Docket No. CA-76-3256-"C"

CORENSWET, INC.,
Plaintiff-Appellee,

versus

AMANA REFRIGERATION, INC.,
Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Louisiana

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, vacated;

It is further ordered that plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

April 30, 1979

ISSUED AS MANDATE: JUNE 19, 1979

AFFIDAVIT

COUNTY OF IOWA)
) ss:
STATE OF IOWA)

DAN R. MC CONNELL, being duly sworn, deposes and says:

1. I am an employee of Amana Refrigeration, Inc. ("Amana") having commenced my employment on or about August, 1969. I am presently Vice President-Sales, Major Appliances and in that capacity, I am responsible for implementing the procedures involved when there is a change of an authorized distributor of Amana major appliances.

2. The information contained in this Affidavit is based upon facts of which I have personal knowledge and is also offered upon information obtained from the examination of corporate records over which I have control.

3. On June 25, 1979, the Distributor Agreement entered into between Amana and Corenswet, Inc., dated July, 1975 was effectively terminated.

4. As of June 26, 1979, Amana entered into a written Distributor Agreement with the Lehleitner Company in New Orleans, Louisiana, whereby the Lehleitner Company replaced Corenswet as the authorized distributor of Amana major appliances. As of that date, the Lehleitner Company actively began the distribution of Amana products in accordance with the written Distributor Agreement.

5. Following the termination of Corenswet, an orderly transition of Amana products from Corenswet to Lehleitner Company was implemented. The Corenswet Company surrendered its possession of all remaining Amana products and as of July 18, 1979 the Corenswet Company no longer possessed any inventory of Amana products.

S/Dan R. McConnell
DAN R. MC CONNELL

Subscribed and sworn to before me this 14th day of September, 1979.

S/Mary K. Bolger
NOTARY PUBLIC IN AND FOR STATE OF IOWA